

## § 12.89

the safety or effectiveness of a class of drug products, the safety of a food or color additive, or a definition and standard of identity for a food; or the issues may have specific applicability to past action and depend upon particular facts concerning only that party, e.g., the applicability of a grandfather clause to a particular brand of a drug or the failure of a particular manufacturer to meet required manufacturing and processing specifications or other general standards.

(i) If the proceeding involves general issues, direct testimony will be submitted in writing, except on a showing that written direct testimony is insufficient for a full and true disclosure of relevant facts and that the participant will be prejudiced if unable to present oral direct testimony. If the proceeding involves particular issues, each party may determine whether, and the extent to which, each wishes to present direct testimony orally or in writing.

(ii) Oral cross-examination of witnesses will be permitted if it appears that alternative means of developing the evidence are insufficient for a full and true disclosure of the facts and that the party requesting oral cross-examination will be prejudiced by denial of the request or that oral cross-examination is the most effective and efficient means to clarify the matters at issue.

(2) Witnesses shall give testimony under oath.

(c) Except as provided in paragraph (d) of this section, in a hearing involving issuing, amending, or revoking a regulation or order, the originator of the proposal or petition or of any significant modification will be, within the meaning of 5 U.S.C. 556(d), the proponent of the regulation or order, and will have the burden of proof. A participant who proposes to substitute a new provision for a provision objected to has the burden of proof in relation to the new provision.

(d) At a hearing involving issuing, amending, or revoking a regulation or order relating to the safety or effectiveness of a drug, device, food additive, or color additive, the participant who is contending that the product is safe or effective or both and who is requesting approval or contesting with-

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drawal of approval has the burden of proof in establishing safety or effectiveness or both and thus the right to approval. The burden of proof remains on that participant in an amendment or revocation proceeding.

[44 FR 22339, Apr. 13, 1979 as amended at 64 FR 399, Jan. 5, 1999]

### § 12.89 Participation of nonparties.

(a) A nonparty participant may—

(1) Attend all conferences (including the prehearing conference), oral proceedings, and arguments;

(2) Submit written testimony and documentary evidence for inclusion in the record;

(3) File written objections, briefs, and other pleadings; and

(4) Present oral argument.

(b) A nonparty participant may not—

(1) Submit written interrogatories; and

(2) Conduct cross-examination.

(c) A person whose petition is the subject of the hearing has the same right as a party.

(d) A nonparty participant will be permitted additional rights if the presiding officer concludes that the participant's interests would not be adequately protected otherwise or that broader participation is required for a full and true disclosure of the facts, but the rights of a nonparty participant may not exceed the rights of a party.

[44 FR 22339, Apr. 13, 1979, as amended at 48 FR 51770, Nov. 14, 1983]

### § 12.90 Conduct at oral hearings or conferences.

All participants in a hearing will conduct themselves with dignity and observe judicial standards of practice and ethics. They may not indulge in personal attacks, unseemly wrangling, or intemperate accusations or characterizations. Representatives of parties shall, to the extent possible, restrain clients from improprieties in connection with any proceeding. Disrespectful, disorderly, or contumacious language or conduct, refusal to comply with directions, use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct during any hearing, constitute

grounds for immediate exclusion from the proceeding by the presiding officer.

**§ 12.91 Time and place of prehearing conference.**

A prehearing conference will commence at the date, time, and place announced in the notice of hearing, or in a later notice, or as specified by the presiding officer in a notice modifying a prior notice. At that conference the presiding officer will establish the methods and procedures to be used in developing the evidence, determine reasonable time periods for the conduct of the hearing, and designate the times and places for the production of witnesses for direct and cross-examination if leave to conduct oral examination is granted on any issue, as far as practicable at that time.

**§ 12.92 Prehearing conference procedure.**

(a) Participants in a hearing are to appear at the prehearing conference prepared to discuss and resolve all matters specified in paragraph (b) of this section.

(1) To expedite the hearing, participants are encouraged to prepare in advance for the prehearing conference. Participants should cooperate with each other, and request information and begin preparation of testimony at the earliest possible time. Failure of a participant to appear at the prehearing conference or to raise matters that could reasonably be anticipated and resolved at that time will not delay the progress of the hearing, and constitutes a waiver of the rights of the participant regarding such matters as objections to the agreements reached, actions taken, or rulings issued by the presiding officer and may be grounds for striking the participation under § 12.45.

(2) Participants shall bring to the prehearing conference the following specific information, which will be filed with the Division of Dockets Management under § 12.80:

(i) Any additional information to supplement the submission filed under § 12.85, which may be filed if approved under § 12.85(c).

(ii) A list of all witnesses whose testimony will be offered, orally or in writ-

ing, at the hearing, with a full curriculum vitae for each. Additional witnesses may later be identified, with the approval of the presiding officer, on a showing that the witness was not reasonably available at the time of the prehearing conference or the relevance of the witness' views could not reasonably have been foreseen at that time.

(iii) All prior written statements including articles and any written statement signed or adopted, or a recording or transcription of an oral statement made, by persons identified as witnesses if—

(a) The statement is available without making request of the witness or any other person;

(b) The statement relates to the subject matter of the witness' testimony; and

(c) The statement either was made before the time the person agreed to become a witness or has been made publicly available by the person.

(b) The presiding officer will conduct a prehearing conference for the following purposes:

(1) To determine the areas of factual disagreement to be considered at the hearing. The presiding officer may hold conferences off the record in an effort to reach agreement on disputed factual questions.

(2) To identify the most appropriate techniques for developing evidence on issues in controversy and the manner and sequence in which they will be used, including, where oral examination is to be conducted, the sequence in which witnesses will be produced for, and the time and place of, oral examination. The presiding officer may consider—

(i) Submission of narrative statements of position on factual issues in controversy;

(ii) Submission of evidence or identification of previously submitted evidence to support such statements, such as affidavits, verified statements of fact, data, studies, and reports;

(iii) Exchange of written interrogatories directed to particular witnesses;

(iv) Written requests for the production of additional documentation, data, or other relevant information;